STATE OF MICHIGAN

COURT OF APPEALS

TONY WESTBROOK,

Plaintiff-Appellant,

v

BLAKE DILLEY and GENE KAPP,

Defendant-Appellees.

UNPUBLISHED
May 13, 1997

No. 179904
Wayne Circuit Court
LC No. 93-325588 NZ

Before: Gribbs, P.J., and Young and W.J. Caprathe,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm.

Defendants are Michigan State highway patrol officers, who were assigned to patrol the City of Detroit on the evening of January 14, 1993. Shortly after 1:00 A.M. that morning, defendants observed plaintiff travelling northbound on Livernois in a Ford Ranger pickup truck with no headlights on. Defendants turned on their overhead lights and siren to effectuate a traffic stop, but plaintiff did not pull over. Instead, plaintiff continued on Livernois at a low rate of speed until he stopped at the northeast corner of Livernois and McNichols.

Defendant Kapp parked behind the truck, exited the police car, and began approaching the driver's side of plaintiff's truck until he observed that the truck was still in gear. At this point, he remained standing behind the vehicle. Defendant Dilley also observed that the truck was still in gear and cautiously approached plaintiff's truck from the passenger side. Dilley illuminated his police flashlight into the vehicle and saw a handgun laying next to plaintiff. According to Dilley, plaintiff then pointed the gun at him, and fearing for his safety, he fired once into the vehicle. Plaintiff denies pointing the gun at Dilley because he knew that the gun was inoperable. Plaintiff contends that when he saw Dilley, he was startled and suddenly turned towards Dilley and was raising his hands when Dilley fired into the vehicle. The window on the passenger side shattered, and glass went into plaintiff's eyes. Plaintiff attempted to drive away in his vehicle but then crashed in a snowbank in a nearby parking lot. He then ran from his

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* Circuit judge, sitting on the Court of Appeals by assignment.

vehicle, and was pursued by defendants. Plaintiff alleges that he heard one of the officers yell "freeze or I'll shoot your black ass," and that he was knocked to the ground and handcuffed. After he was apprehended, plaintiff was taken to the emergency room at Detroit Receiving Hospital where glass was removed from his right eye.

Plaintiff was subsequently charged with carrying a concealed weapon, MCL 750.227; MSA 28.424, felonious assault, MCL 750.82; MSA 28.277, felony firearm, MCL 750.227b; MSA 28.424(2), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). Plaintiff waived his right to a preliminary examination and was bound over for trial. During trial, a recent report from a police firearms expert concluded that the gun found in plaintiff's truck was inoperable. Consequently, the remaining firearms related charges were dismissed, and plaintiff's drug charge was remanded to District Court.[1]

In this civil action, plaintiff brought counts of assault, battery, malicious prosecution, ethnic intimidation, intentional infliction of emotional distress, and gross negligence against defendants.[2] Defendants moved for summary disposition, alleging that no genuine issue of material fact support plaintiff's claims, and that they were immune from suit. The trial court concurred, and dismissed plaintiff's complaint in its entirety.

On appeal, plaintiff primarily disputes the lower court's ruling on the grounds that genuine issues of material fact exist regarding his tort claims and that defendants are not immune from tort liability.[3] Plaintiff specifically contends that the lower court resolved questions of credibility regarding his tort claims and alternatively, that defendants' conduct exceeded the scope of their authority and also amounted to gross negligence.

A trial court's decision to grant a motion for summary disposition is reviewed de novo by this Court to determine if the defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A reviewing court must examine all relevant affidavits, depositions, admissions, and other documents, construing the evidence in favor of the nonmoving party. *Shirilla v City of Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). The court then determines whether a genuine issue of material fact exists on which reasonable minds could differ. *Id*.

In reviewing a motion brought pursuant to MCR 2.116(C)(7), a court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. MCR 2.116(G)(5); *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992); *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992). The plaintiff's complaint is reviewed to determine whether facts have been pleaded justifying a finding that recovery in tort is not barred by governmental immunity. *Harrsion*, *supra* at 449. A motion for summary disposition pursuant to MCR 2.116(C)(7) should only be granted if no factual development could provide a basis for recovery. *Id*.

Plaintiff first argues that there were genuine factual issues regarding his claims of assault and battery against defendants and contends that defendants' conduct was unreasonable and outside the scope of their authority. Plaintiff also contends that the trial court resolved a credibility question by crediting Dilley's affidavit that plaintiff pointed the gun at Dilley, and discrediting plaitniff's allegations and testimony that he never grabbed the gun because he knew it was inoperable when he purchased it that evening. We disagree. The trial court made no statement regarding the credibility of plaintiff nor defendants. Instead, the trial court ruled, and we concur, that defendants' conduct was reasonable in light of the surrounding circumstances.

Police officers are given a wide degree of discretion to determine how to respond in dangerous situations. *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 659; 363 NW2d 641 (1984). This allows a police officer to use as much force as is reasonably necessary to effectuate a lawful arrest when a suspect resists arrest. *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989). Also, if a police officer has a reasonable belief that he or she is in great danger, the officer may use such force as is reasonably necessary in self-defense, and the officer is not required to retreat when confronted with a display of force by the suspect. *Alexander v Riccinto,* 192 Mich App 65, 69; 481 NW2d 6 (1991). Hence, when confronted with a life threatening situation, an officer may use deadly force in defense of his own life, in defense of others, or when pursuing a fleeing felon. *Ealey v Detroit*, 144 Mich App 324, 332; 375 NW2d 435 (1985). Ordinarily, what constitutes a reasonable belief of great danger is a fact question. *Alexander, supra,* at 69. However, that is not so in the instant case.

The undisputed evidence shows that defendants initiated a stop of plaintiff as his truck's headlights were not on in the middle of the night. Having observed furtive movements by plaintiff in the truck before he came to a stop and knowing that plaintiff's truck was still in gear, defendants cautiously approached the vehicle. Given that Dilley observed that plaintiff had a handgun seated next to him as well as plaintiff's sudden movements towards Dilley including raising his hands, we conclude reasonable minds would not disagree that defendant Dilley had a reasonable belief that his life was in danger. As such, firing once into the truck was a reasonable and necessary act of self-defense under these circumstances. *Ealey, supra* at 332.

In addition, reasonable minds would not differ regarding whether the officers acted reasonably in their pursuit and subsequent arrest of plaintiff. Plaintiff claims that he was assaulted, i.e., placed in imminent fear of a battery, when he heard one of the officers yell, "Freeze, or I'll kill your black ass," and then battered when both officers threw him to the ground, kicking him several times before handcuffing him. Although plaintiff alleges that an officer used offensive and inappropriate language, defendants were authorized in light of all the circumstances to effectuate plaintiff's arrest including ordering him to stop and using reasonable force to subdue and handcuff him. Given the potentially dangerous situation that these officers encountered, plaintiff has not shown that defendants exceeded the scope of their authority when arresting him that evening. Thus, the lower court properly dismissed plaintiff's assault and battery claims.

Plaintiff next argues that genuine factual issues remain regarding his claims for malicious prosecution, ethnic intimidation, and intentional infliction of emotional distress. We disagree. Not only is

there an absence of genuine factual issues, plaintiff has also not shown that defendants acted outside the scope of their authority sufficient to defeat defendants' statutory immunity.

First, regarding his claim for malicious prosecution, plaintiff cannot establish that defendants acted without probable cause in attesting to facts leading to the criminal charges. To establish this claim, plaintiff must prove that defendants acted with malice and either initiated or continued a legal proceeding against him without probable cause. *Payton v City of Detroit*, 211 Mich App 375, 395; 536 NW2d 233 (1995); *Simmons v Telcom Credit Union*, 177 Mich App 636, 638; 442 NW2d 739 (1989). "It is well-settled that one who makes a full and fair disclosure to the prosecutor is not subject to an action for malicious prosecution." *Koski v Vohs*, 426 Mich 424, 439; 395 NW2d 226 (1986). As such, "'the only situation in which an action for malicious prosecution would properly lie is where a police officer knowingly swears to false facts in a complaint, without which there is no probable cause.'" *King v Arbic*, 159 Mich App 452, 466; 406 NW2d 852 (1987) (quoting *Belt v Ritter*, 18 Mich App 495, 503; 171 NW2d 581 (1969)).

There is no evidence that the officers knowingly swore to false facts in the reports submitted for review by the prosecutor. Further, the prosecutor attested that after reviewing *both* defendants' reports and reports from the investigating officers with the Detroit Police Department, he determined that there was probable cause to authorize warrants against plaintiff. The fact that the gun was inoperable was not determined until trial after a police firearms expert determined that the gun was inoperable. The prosecutor's determination that there was probable cause was not defeated because the criminal charges could not be proven beyond a reasonable doubt. See *Koski, supra* at 432-433. Significantly, although plaintiff maintains that no probable cause existed to support the charges, he waived a preliminary examination in which he could have contested the lack of probable cause as a basis to dismiss the charges. Since the evidence shows that defendants made full and fair disclosure to the prosecutor who then determined that probable cause existed, plaintiff's malicious prosecution claim is barred. *Koski, supra* at 439; see also *Modla v Miller*, 344 Mich 21, 22; 73 NW2d 220 (1955).

Second, plaintiff argues that dismissal of the ethnic intimidation claim warrants reversal. The ethnic intimidation statute provides that a person is liable for civil damages if he or she maliciously and with specific intent to intimidate or harass another person because of their race, color, religion, gender or national origin, threaten to or cause physical contact with another person. MCL 740.147b(1)-(3); MSA 28.344(1)-(3). The statement "Freeze or I'll shoot your black ass," allegedly made when the officers were pursuing plaintiff, did contain a reference to plaintiff's race and ostensibly threatened him with physical harm. However, looking at the specific facts of this case, plaintiff's own actions created the exigent circumstances and provided the probable cause that justified his pursuit and arrest. Viewed in context, the alleged statement does not support an inference that the statement was made maliciously and with the specific intent to harass or intimidate plaintiff *because* of his race. Therefore, given these facts, the use of a racial epithet without more cannot transform the justified conduct of these officers in this volatile situation into a case of ethnic intimidation.

Lastly, plaintiff's claim for intentional infliction of emotional distress was also properly dismissed. The language used by the officers was not so outrageous and beyond the bounds of human decency as

to support plaintiff's claim of intentional infliction of emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985) (quoting Restatement Torts, 2d, § 46, comment d, pp 72-73). Further, plaintiff's emotional distress claim could not be based on Dilley's conduct in shooting into the truck as Dilley's conduct was a reasonable attempt to protect his own life. *Ealey*, *supra* at 332; *Roberts*, *supra* at 603 (quoting Restatement Torts, 2d, § 46, comment g, pp 76) ("An actor is never liable where he has done no more than to insist upon his legal rights in a permissible way.").

Plaintiff alternatively argues that the court erred in ruling that the Dilley's conduct was not grossly negligent. "'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996 (107)(2)(c). Plaintiff contends that since he was simply raising his hands when Dilley shot into the truck, Dilley had no basis to shoot into the truck, and hence demonstrated a substantial lack of concern for resulting injury. Yet, as stated above, police officers are afforded a wide degree of discretion to determine the best course of action to stop crime and other unlawful conduct and to apprehend criminals or other wrongdoers. *Brown v Shavers*, 210 Mich App 272, 276; 532 NW2d 856 (1995)(quoting *Ross*, *supra* at 659). Reasonable minds would not disagree that Dilley's decision to fire into the truck was based on a reasonable belief that his life was in danger, and hence, not an abuse of that discretion. We also conclude that plaintiff has not established gross negligence regarding his arrest and pursuit as defendants were authorized to use reasonable force to effectuate plaintiff's arrest. *Tope*, *supra* at 106. Accordingly, the trial court correctly ruled that defendants' conduct was not grossly negligent, and thus, entitled to immunity.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe

[1] The concealed weapon charged had been dismissed prior to trial, after remand to the district court, plaintiff pleaded guilty to possession of marijuana.

[2] Plaintiff's complaint also included a count of constitutional tort that was dismissed. Plaintiff does not contest dismissal of that count on appeal.

[3] Defendants, as government employees, are entitled to the defense of immunity if all of the following conditions are met:

> (a) The officer . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c) The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

MCL 691.1407(2)(a-c); MSA 691.1407(2)(a)-(c).